88-1620

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EDWARD J. PETRUS

Petitioner

-V-

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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9408

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant can be guilty of obstruction of justice by urging, advising and attempting to persuade a witness, in violation of 18 U.S.C. § 1503, when Congress removed all references to witnesses from § 1503 in 1982?

2. Whether a violation of the Medicare and Medicaid fraud statutes, 42 U.S.C. § 1395nn and § 1396h, require a financial loss to programs or the beneficiaries for a felony offense?

3. Whether a guilty plea is voluntary if based on counsel's misunderstanding of the statutory offenses, and a deliberate breach of the plea agreement by the government?

4. Whether the trial court violated Rule 11, F.R.Cr.P., by failing to adequately inquire that there was a factual basis for the plea?

5. Whether the Appellate Court erred by not determining that trial counsel's performance was incompetent?

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The opinion of the Court of Appeals rendered December 1, 1988 is attached as Appendix A

Petitioner's motion for rehearing dated December 12, 1988 is attached as Appendix B

The order of the Court of Appeals denying petition for rehearing dated January 3, 1989 is attached as Appendix C

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 1, 1988. Petitioner filed a petition for rehearing and request that the case be heard En Banc on December 12, 1988, which was denied on January 3, 1989. This petition is being filed within sixty (60) days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First, Fifth and Sixth Amendments to the Constitution of the United States.

Title 18 U.S.C. Section 1503, Section 1512; Title 42 U.S.C. Section 1395nn, Section 1396h.

Rule 11, and 32 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

On October 19, 1984, a grand jury handed down an indictment charging the petitioner with submitting false Medicare claims in violation of 42 U.S.C. § 1395nn(a)(2); submitting false Medicaid claims in violation of 42 U.S.C. 1396h(a)(2); and obstruction of justice in violation of 18 U.S.C. 1503. Petitioner withdrew his plea of not guilty upon the

insistence of his attorney and pled guilty to one count to each offense. After the presentation of the government's distorted version of events, the petitioner requested his trial attorney file a direct appeal, which was not done. The petitioner then filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in July 1986. The district court denied the §2255 motion on October 30, 1987. An appeal was filed November 13, 1987 which was denied December 1, 1988. A petition for rehearing and rehearing en banc was submitted December 12, 1988, and denied January 3, 1989.

Petitioner's problems, leading to his indictment, began in 1979, when clerical difficulties were found in the handling of claims for therapeutic soft contact lenses. The plaintiff accepted responsibility for the error, and pled nolo contendere to a misdemeanor and fine. In 1981, Medicare notified him that he was to be suspended because of

this prior suspension from Medicaid in 1979.

After an injunction, petitioner agreed to a six month suspension, which included a resuspension from Medicaid for the same offense (possible double jeopardy).

Anticipating his suspension, petitioner hired a physician for the sole purpose of treating all Medicare/Medicaid patients. In June 1983, petitioner was informed that his suspension was retroactively effective from May 12, 1983. Petitioner informed his staff to writeoff 331 patient visits during the interim from May 12, 1983 through June 14, 1983. Six claims were erroneously resubmitted by the staff during that time. Any surgery performed on the Medicare/Medicaid patients was done by the hired physician and the petitioner, but only charged for the services of the hired physician.

Petitioner was to be reinstated on November 13, 1983, but the agency denied procedural due process.

After Dr. Baer's departure, there were eleven telephone conversations between Baer and the petitioner. Dr. Baer called the petitioner and informed him that he was to appear before a grand jury and lacked information on the patients. On March 7, 1984, in a conversation recorded by Agents Michael Gist and Gene Forge,(Count 31) Dr. Baer feigned confusion, and the petitioner, responding in frustration and functioning under great duress, advised Dr. Baer that if he was not sure of the facts to admit that he did not remember - he was never advised to lie.

The indictment that followed was a concerted effort of agents Gist and Forge to coerce and pay Dr. Malsky (who was billing from his Killeen office for procedures paid to him by the petitioner), Dr. Baer (whose future participation in Medicare and Medicaid was threatened). and Ms. Simmons (who was threatened with imprisonment for independently altering documents) to testify and work against the

petitioner.

While insisting on a jury trial to present the truth (Evid. Hearing Tr. 73), the petitioner had a disabling accident on April 27, 1985, and as a result of the undue influence of his attorney, he agreed to plead guilty against his will, as evidenced by his continuing assertion of innocence demonstrated in his sentencing transcript (Arr. Tr. 14-15) and "Defendant's Version of Offense."

The factual basis set forth by the government was grossly distorted and inaccurate (Arr. Tr 70), and although a detailed list of corrections was submitted to petitioner's trial attorney, they were not presented to the court. A list of objections to the presentence report was not timely presented to the court, and the trial attorney did not obtain a ruling on the controverted issues that were taken into consideration at sentencing (Sent. Tr. 8).

After sentencing on June 13, 1985, the plea

agreement was violated on two occasions. First, the government provided unsubstantiated data, such as the dollar amount of the alleged Medicare/Medicaid claims to the parole officer, which adversely influenced the sentence recommendation to the court. Second, the government vigorously opposed petitioner's motion to reduce sentence pursuant to Rule 35, F.R.Cr.P.. Both actions violated the plea agreement by making a recommendation as to sentence.

A § 2255 motion was filed in July 1986, and on October 30, 1987 the court denied the motion. Petitioner's notice of appeal was filed on November 13, 1987, and denied December 1, 1988. Petition for rehearing and hearing en banc was submitted December 12, 1988 and denied January 3, 1989.

SUMMARY OF THE ARGUMENT

In the Fifth Circuit an ordinary conversation can be a felony, if one of the parties is a witness at a grand jury hearing. Con-

gress recognized this problem with 18 U.S.C. § 1503, and in 1982 removed all references to witnesses from § 1503, and enacted § 1512-15. Congress was very specific as to the type of behavior required to trigger an offense against witnesses, because of the delicate balance between constitutionally-protected conduct and deliberate acts, that constitute obstruction of justice. The Second Circuit recognized this distinction, and their decisions are at conflict with the Fifth Circuit. The petitioner's actions fall within the constitutionally-protected conduct category. This Court needs to clarify this conflict.

Many legitimate business transactions by medical providers are being arbitrarily and capriciously charged with Medicare/Medicaid fraud because of statutory vagueness. Legislative intent was to provide penalties for practices <u>which result in an unnecessary financial loss to the Medicare or Medicaid program or the beneficiary</u>. This touchstone

needs to be addressed by this Court. Since the petitioner provided the services, at no additional cost to the programs or beneficiaries, his actions failed to trigger a statutory violation.

The confusion of the courts regarding the statutes, led to a failure of the district court to adequately inquire that a factual basis existed for the guilty plea, in violation of Rule 11, F.R.Cr.P..

Petitioner's counsel did not accurately understand the statutes. Coupled with procedural defaults demonstrated throughout the hearings, his performance was rendered incompetent. If a colorable constitutional claim strongly implies incompetence, then the incompetence is itself cause for such a default. If a defendant has a procedural right to competent counsel, then a showing that his counsel was incompetent would demonstrate a violation of that right. Petitioner asserts he was prejudiced by his counsel's actions.

ARGUMENT I

PETITIONER COULD NOT BE GUILTY OF OBSTRUCTION OF JUSTICE IN VIOLATION OF 18 U.S.C. § 1503 BECAUSE CONGRESS REMOVED ALL REFERENCES TO WITNESSES FROM 18 U.S.C. § 1503 IN 1982.

Certiorari should be granted because the decision of the Fifth Circuit Court of Appeals that the petitioner could be prosecuted for violating 18 U.S.C. § 118 U.S.C. § 1503 for urging, advising and attempting to persuade a witness, conflicts with the decisions of other Federal Courts of Appeal.

Petitioner was indicted and convicted for obstruction of justice in 1984, alleging that he "urged, advised and attempted to persuade the said Dr. Gregory Baer to give false testimony before said grand jury", in violation of 18 U.S.C. § 1503. In 1982, Congress deleted any acts affecting witnesses from 18 U.S.C. § 1503.

18 U.S.C. § 1503

Prior to its amendment in 1982, § 1503 read as follows (underlined portions

were deleted in 1982):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter or communication, influences, obstructs, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

SECOND CIRCUIT DECISIONS

With the enactment of the Victim and

Witness Protection Act[1] (VWPA), Congress deliberately deleted witnesses from § 1503, and the government must proceed solely under 18 U.S.C. § 1512-1515 if the conduct is directed toward witnesses. The Second Circuit in United States v. Hernandez, 730 F. 2d 895 (2nd Cir. 1984), held that 18 U.S.C. § 1512 is the sole and exclusive remedy for acts directed toward witnesses. The Court stated that "Congress affirmatively intended to remove witnesses entirely from the scope of § 1503," Id., at 898. The Court in explaining the history of the statutes and the intent of Congress in enacting VWPA, ruled in favor of the defendant and stated:

> "Viewing the actions of Congress and the plain language of both statutes realistically, we agree with Lorenzo and conclude that Congress affirmatively intended to remove witnesses entirely from the scope of § 1503." Supra at 898.
>
> "We are unpersuaded by the government's argument that the residual clause of § 1503 still covers witness harassment.

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[1]Pub. L. 97-291, 96 Stat. 1253, October 12, 1982

> Not only does the argument defy common sense, but it is also contrary to the legislative history of Pub. L. No. 97-291. Senator Heinz, a prime mover of the bill, explained that the version of Pub-L. No. 97-291 finally enacted into law incorporated the house position, which had provided that § 1512 would replace that part of § 1503 that pertained to witnesses, rather than the senate bill, which had reflected the government's position in this case:
>
> The Senate-passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to supenaed [sic] witnesses. The compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law.
>
> 128 Cong.Rec. S 13063 (daily ed. Oct. 1, 1982). (Emphasis supplied) Supra at 899.

An additional decision, United States v. Rodolitz, 786 F. 2d 77, 82 (2nd Cir. 1986) verified the Hernandez decision and stated:

> "The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury.
>
> In sum, the court finds that using misrepresentation to convince someone to lie to the grand jury falls squarely

within the prohibition of section 1512."

In United States v. Wilson, 565 F. Supp. 1416 (S.D. N.Y. 1983) the government chose the proper statutes for the proper charge and proceeded accordingly. The indictment charged a violation of § 1503 for threatening to kill two prosecutors, and charged a violation of § 1512 for threatening witnesses. The court found that the acts directed toward the prosecutors could fit under either the specific or omnibus clause of § 1503. By threatening to kill the prosecutors the defendant was endeavoring to interfere with an officer of the court and impede the administration of justice (omnibus clause). Wilson supra, at 1433. The charges alleging threats against witnesses were only pursued under § 1512. This supports the argument made by the petitioner. The acts in Wilson could have been a violation of either clause of § 1503 prior to 1982, now conduct directed toward witnesses

has its own statute.

Section 1503 has two separate clauses. The first expressly prohibits conduct directed at a specific class or group of individuals (officers or jurors). The second clause is the "omnibus" clause and is directed toward corrupt practices obstructing the "due administration of justice" as it applies to that specific class or group of individuals. To interpret differently is to invoke the rule regarding strict construction of criminal statutes known as "ejusdem generis."[2] The general clause at its end must be read to embrace only acts and persons mentioned in the preceding specific language. Haili v. United States, 260 F. 2d 744 (9th Cir. 1958). See United States v. Essex, 407 F. 2d 214

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[2]Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black's Law Dictionary, 464 (5th ed 1979).

(6th Cir. 1969); United States v. Scoratow, 137 F. Supp. 620 (W.D. Pa 1956).

Even considering the extremely broad scope given § 1503 by some courts, it is unlikely that the statements made by the petitioner to the witness could be construed as "urging, suggesting or instructing another to give misleading testimony before a Grand Jury..." United States v. Beatty, 587 F. Supp.1325, 1332 (E.D. N.Y 1984). There is no indication that the petitioner's statement was meant as such an attempt but rather is more likely to come under the definition of constitutionally-protected conduct.

In United States v. King, 762 F. 2d 232 (2d Cir. 1985), the court held that by enacting the VWPA, Congress intended that all witness tampering should be prosecuted exclusively under § 1512-1515. The court held that even if the defendant's conduct might be proven to amount to obstruction of justice in violation of § 1503, it should be prosecuted

only under § 1512. The court stressed that while a nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information might go unpunished under its construction of the statute if there was a lacuna in the legislative scheme, the proper remedy was for Congress to enact legislation to close the gap. The Supreme Court has declined to resolve this issue to date.

The Fifth Circuit, in affirming the petitioner's conviction, rejected the ruling by the Second Circuit, and thus created a conflict between the circuits. Had the petitioner resided within the jurisdiction of the Second Circuit his conviction would have been reversed.

The Fifth Circuit cited United States v. Wesley, 748 F. 2d 962 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985), a decision rendered two months after the indictment, thus the petitioner was charged under an ex post facto interpretation of § 1503. The Wesley

case was decided nine months after the alleged obstruction, and the Hernandez decision was the controlling interpretation of § 1503 since it was the first case to address the issue after the enactment of the 1982 legislation. The Fifth Circuit felt that by urging and advising the witness to testify falsely, Wesley was guilty of violating § 1503, since a strict interpretation of § 1512 was felt to leave a judicial gap.

The Supreme Court in Iselin v. United States, 270 U.S. 245, 251 (1926) said that courts should not enlarge a statute so that "what was omitted, presumably by inadvertence may be included within its scope. To supply omissions transcends the judicial function." A careful reading of § 1512 shows that it does fill the judicial gap mentioned by the Fifth Circuit.[3]

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[3] § 1512 provides in pertinent part:
(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct

The witness in this case, Dr. Gregory Baer, while working as a paid investigative arm for the government, made repeated phone calls to the petitioner in an attempt to entrap him. Dr. Baer's feigned memory lapses during the taped conversations led the petitioner to urge Dr. Baer to admit his poor memory.[4] What occurred was a conversation

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toward another person with intent to -

(1) influence the testimony of any person in an official proceeding;

[4] Baer: But see <u>I've never seen her.</u>
Petrus: Well, you, you have.
Baer: Oh.
Petrus: Because your name is on the, it's your handwriting, you even checked her pressure, you even checked her pressure.
Baer: Hum, but, but when they say to me Dr. Baer did you do the blepharoplasty? Then what do I say?
Petrus: Um, just uh, well that you did not do the blepharoplasty that I did the blepharoplasty, that I did the, I did the lid procedure and that I was under your supervision on it.
Baer: What if I wasn't in the room?
Petrus: Oh, you were, but you don't remember? You don't remember that she was a short, real short lady?
Baer: No, no <u>I remember her real well</u>, but I saw her after the blepharoplasty

between two physicians protected by the First Amendment, to penalize such speech is a violation of due process.

DUE PROCESS CLAUSE

The Due Process Clause of the Fifth Amendment requires that a criminal statute give fair warning of the conduct it prohibits. U.S. Const. Amend. V; Bouie v. City of Columbia, 378 U.S. 347, 350 (1964). To do this, the language of the statute must be clear and unequivocal in its meaning. The Court in United States v. Harriss, 347 U.S. 612 (1954) said, "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." The Harriss court reasoned that a criminal statute that fails to give an ordinary person notice his conduct is forbidden by law, violates a constitution-

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was all done.
(from the transcript dated March 7, 1983, p 13, emphasis added)

al requirement for definiteness.

FAIR WARNING PRINCIPLE

The "fair warning" principle has been interpreted to (1) require not only certainty as to a statute's meaning but also (2) to require avoidance of the retroactive application of a statute and, (3) to restrict judicial expansion of a statute's construction. Bouie v. City of Columbia, 378 U.S. at 362; Brown v. Ohio, 432 U.S. 161, 170 (1977); Marks v. United States, 430 U.S. 188, 195 (1977) United States v. Bass, 404 U.S. 336 (1971). In both Bouie and Marks, the Court held that the Due Process Clause precluded the application of statutes given effect after the acts of the accused had occurred. Petitioner's position is analogous because his conviction is affirmed by the retroactive Wesley decision which occurred after the occurrence at issue took place. If Congressional intent is not clear, then the statute must be construed within its narrowest possible meaning and

resolved in favor of the accused. The courts are not free to expand the scope of criminal liability if there is any question as to the meaning of the statute, as this would be an unforeseeable conclusion and violate the Due Process Clause.

CONSTITUTIONALLY-PROTECTED CONDUCT

There is an important distinction between prohibited behavior and constitutionally-protected conduct. What has happened to the petitioner is a violent reduction of his status from that of an ordinary citizen with rights of free speech, to the status of a person in such jeopardy of being found guilty of a crime, and that his whole existence is being considered only by his relationship to the individual parties in the potential or ongoing judicial proceeding. Thus he has lost all other consideration with respect to his civil rights.

PETITION FOR CERTIORARI

The Supreme Court, in considering the

Wesley petition for certiorari, Justice White, was joined by Justice Brennan and Justice Marshall in dissenting stated:

> "The Courts of Appeals of two large Circuits have arrived at contrary interpretations of an important criminal statute I would grant certiorari in these cases to resolve the conflict."[5]

ARGUMENT II

A VIOLATION OF THE MEDICARE/MEDICAID FRAUD STATUTES REQUIRE A FINANCIAL LOSS TO THE PROGRAM OR THE PATIENT

The Fifth Circuit, lacking any actual authority to support their decision, found itself in the indefensible position of expanding the meaning of the statutes in distressing disregard of the express desire of Congress. A violation of 42 U.S.C. § 1395nn and § 1396h requires three elements: (1) misrepresentation, (2) knowingly and willfully done, (3) for services not performed or supplied by the provider. The Medicare Act and the Regional Office Manual (HFCA Pub 23-

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[5]471 U.S. 1130 (1985).

2) states:

> The legislative intent of this provision was to: "provide penalties for certain practices which have long been regarded by professional organizations as unethical, as well as unlawful in some jurisdictions, and which contribute appreciably to the cost of the Medicare and Medicaid programs...(including) such practices as the soliciting, offering or accepting of kickbacks or bribes, including the rebating of a portion of a fee or charge for a patient referral..."
>
> S.Rep 92-1230, 92d Cong., 2d Sess (1972)

Thus, Congress made a violation of § 1395nn and § 1396h a felony offense only if there was a financial loss to the programs or the beneficiaries.

Justice Blackmum in a concurring and dissenting opinion stated: "Each such statute must be justified by reference to the governmental objectives it purportedly seeks to further." Bankers Life & Casualty co. v. Crenshaw, 108 SCt 1645 (1988). Medicare Intermediary Manual, Chapter V, § 3483.3 requires that the agency must document the dollars lost by the program due to the actions of the

provider. Thus, unless an unnecessary financial loss to the Medicare or Medicaid program or the beneficiary can be documented, the action fails to trigger a statutory violation.

ARBITRARY AND CAPRICIOUS ACTION

The indictment charges the petitioner with actually providing the services while he was suspended, and representing that another physician provided the services. The conduct allegedly committed by the petitioner is not prohibited by the Medicare Act, or the Medicare /Medicaid manual, and Health and Human Service's policy to charge the petitioner with fraud was arbitrary and capricious. The policy allowing the petitioner to be charged with fraud was promulgated unlawfully and constitutes arbitrary and capricious agency action, contrary to the Medicare Act. Duggan v. Bowen, 691 F. Supp. 1487, 1514 (D.C. Cir. 1988). The arbitrary and capricious standard of review applies to the review of all agency

decisions. Illinois v. United States, 666 F. 2d 1066, 1071 (7th Cir 1981), cert. denied, 455 U.S. 1000 (1982) (noting that the arbitrary and capricious standard "applies to all cases"). There exists much confusion on what constitutes fraud in the program.[6]

FRAUD VERSUS ABUSE

In Medicare and Medicaid Fraud, American Criminal Law Review, Vol 18:169 (1980), the types of offenses were discussed:

> The amendments distinguish between fraud and abuse. The distinction is important because criminal penalties are imposed for fraudulent acts, while civil sanctions are imposed for those deemed "abuse". Generally, fraud involves intentionally billing for services not rendered (emphasis supplied).

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[6] Medicare guidelines remain a puzzle to ophthalmologists. What are the Rules? "The problem we have is, what is appropriate and what is not appropriate? When you're dealing with the Medicare program, you've got to play by their rules. The only problem is nobody knows what those rules are. Maybe the best way to describe what's going on in the antifraud and abuse area is chaos and confusion." Alan E. Reider, JD. Ophthalmology Times, January 1, 1989.

The government acknowledged that all the patients received the services for which they were billed, and that they were satisfied with the services provided. There were no victims, the patients received the services which were paid for by their voluntary contributions.

CIVIL PENALTIES

In 1987, 42 U.S.C. § 1395nn was repealed and the elements incorporated into § 1320a-7a. This section authorizes civil penalties against a provider submitting claims after termination from the Medicare program. The Medicare and Medicaid Patient and Program Protection Act of 1987 stated:

> Under current law, the Secretary may assess a civil monetary penalty against an individual or entity that has been excluded from Medicare and submits claims for medical items or services if the Secretary has initiated termination proceedings. In addition, payment may not be made where the individual or entity knowingly and willfully made any false statement or misrepresentation in requesting payment. The Secretary may, after appropriate notice, also terminate a provider agreement if the Secretary determines that the provider misreprese-

nted a material fact in requesting payment. U.S. Code Cong & Admin News, 100th Cong 1st Sess, p 682-711, $10, 1987.

Thus by statute, the petitioner could only be assessed a civil penalty for his alleged action.

FIFTH CIRCUIT ERRS ON CITE

The Appellate Court cites United States v. Adler, 623 F. 2d 1287 (8th Cir. 1980) as supporting their position that any false statement or representation is material for a violation of the Medicare/Medicaid statutes. Their reliance on Adler is in error. Adler triggers a violation of 18 U.S.C. § 1001, but not § 1395nn, since misrepresentation alone will not suffice without billing for "items or services" that were either unnecessary or not performed.

FINANCIAL LOSS

The government chose to charge the petitioner with a violation of 42 U.S.C. § 1395 not § 1001. The indictment did not state a dollar amount, an essential element in a Med-

icare/Medicaid fraud charge, because there was no financial loss to the programs or the beneficiaries. The legislative history indicates that Congress enacted the Fraud and Abuse provisions of § 1395nn specifically to prevent an unnecessary financial loss to the programs or the beneficiaries. Since no dollar loss occurred to charge a violation of § 1395nn directly contravenes both the plain meaning of the statute and the expressed intent of the legislature.

INTENT NOT AN ELEMENT

The Appellate Court erred in believing that intent was an essential element of Medicare/Medicaid fraud. The court stated that "Petrus knowingly and voluntarily admitted that he had such an intent...", and that "[t]he statements were more than sufficient to clear up any question concerning Petrus's intent..." The issue of intent is a conclusion by the court, unsupported by the record.

The court in United States v. Cegelka,

853 F. 2d 627, 629 (8th Cir. 1988) concluded; "By the clear language of § 1395nn(a)(1), specific intent to deceive or defraud is not an element of the offense." Since most of the argument of the appellate court is based on the unsupported issue of intent, their position is not upheld by the statute, and the conviction should be reversed.

PROVIDING SERVICES NOT FRAUD

The Appellate Court erred by stating; "the fact that services were actually performed is not significant under the Medicare/Medicaid fraud statutes." (O. p13).

There is no published case of a physician being charged with Medicare/Medicaid fraud when the services were provided. All the published cases involved providers billing for services or supplies not provided.[7]

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7 United States v. Gordon, 548 F. 2d 743 (8th Cir 1977)(physician applied for payments for services not rendered)
United States v. Cacioppo, 517 F. 2d 22 (8th Cir 1975)(physician billed for office and nursing home visits never made)
United States v. Matanky, 482 F. 2d 1319

Providers were also prosecuted under 18 U.S.C. § 1001*, where misrepresentation was the only element. 42 U.S.C. § 1395nn requires three elements: (1) misrepresentation, (2)

(9th Cir), cert. denied, 414 U.S. 1039 (1973)(physician guilty of requesting payment for visits to patients in hospital which were not rendered)

United States v. Catena, 500 F. 2d 1319 (3rd Cir), cert. denied, 419 U.S. 1047 (1974)(submitting claims for house calls never made)

United States v. Varoz, 740 F. 2d 772 (10th Cir 1984)(podiatrist submitted Medicare claims for services not rendered)

United States v. Halper, 590 F. 2d 422 (2d Cir 1978)(billed for sensitivity tests regardless of type of test done)

United States v. Medical Therapy Sciences, Inc., 583 F. 2d 36 (2d Cir 1978)(double billing; billing for unnecessary or undelivered supplies)

United States v. Winkle, 587 F. 2d 705 (5th Cir 1979)(billing for unnecessary tests)

*United states v. Radetsky, 535 F. 2d 556 (10 Cir), cert. denied, 44 U.S.L.W. 3691 (1976)

United States v. Peterson, 488 F. 2d 645 (5th Cir), cert. denied, 419 U.S. 828 (1974)

United States v. Katz, 455 F. 2d 496 (5th Cir), cert. denied, 408 U.S. 923 (1972)

(prosecutions under § 1001 against providers who billed for services not rendered)

knowingly and willfully done, (3) for services not performed or supplied by the provider.

In 1977, by amending the Medicare fraud statute, Congress intended to make it a felony to bill for "items or services" that were either unnecessary or not performed.

> "In 1977, Congress amended § 1395nn and increased penalties for violation of that statute to a fine of up to $25,000 or imprisonment for up to five years or both. At the same time, Congress completely changed the wording of the statute and made the description of the crime much more specific. H.R. Rep. No. 95-393 (II), 95th Cong. Ist Sess. 53 (1977) Reprinted in U.S. Code Cong. & Admin News pp 3039, 3055 (Emphasis added)

Thus, the amended statute had nothing to do with the status of the person who performed the services, but whether or not the services were actually performed. The Health Care Financing Administration has stated:

> The intent of these provisions is not to penalize individuals or entities participating in legitimate business transactions. Rather it is to penalize those who engage in unethical and illegal financial arrangements (such as kickbacks, rebates, or bribes) that unnecessarily increase the cost of federal health care programs.

RULE OF LENITY

No one should be required to guess at the ordinary and logical meaning of a criminal statute. In describing the "rule of lenity" this Court has repeatedly held that no individual should be forced to speculate, at peril of indictment, whether his conduct is prohibited; and to insure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably prescribed. Dunn v. United States, 442 U.S. 100 (1979).

The actions of the petitioner were a legitimate business transaction, approved initially by Medicare, resulting in no increase in cost to the programs or the patients; conviction for a violation of the Medicare/Medicaid fraud statutes should be reversed.

ARGUMENT III

A GUILTY PLEA IS NOT VOLUNTARY IF BASED ON COUNSEL'S MISUNDERSTANDING OF THE STATUTORY OFFENSES AND BREACH OF THE AGREEMENT WITH THE GOVERNMENT

The Appellate Court erred when it stated that the district court did adequately describe the elements of the offenses. No such dialogue is present in the records.

QUALIFIED PLEA

Petitioner's plea of guilty was a "qualified plea" based on counsel's understanding of the statutory offenses and the contractual agreement with the government. It is now apparent that counsel's incompetence in comprehending the essential elements of the statutes, and by failure to secure adequate legal research, made the plea involuntarily.

A guilty plea is an admission of all the elements of the crime charged, but the plea must be entered into knowingly and voluntarily, with the advice of competent counsel. This Court in Boykin v. Alabama, 395 U.S. 238 (1968) stated:

> "a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect coverup of unconstitutionality."
>
> "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Supra at 243 n.5, quoting Johnson v. Zerbst, 304 U.S. 458, 466 (1938).

The Boykin Court held that acceptance of the petitioner's guilty plea under the circumstances of the case constituted reversible error because the record does not disclose that the petitioner voluntarily and understandingly entered his plea of guilty.

PLEA AGREEMENT VIOLATION

Additionally, the government agreed it would "Not make any recommendation as to sentence." The government subsequently proceeded to violate the plea agreement by: (1) making a recommendation to the parole officer in

the pre-sentence investigation report using an incorrect dollar amount that influenced the sentencing. See United States v. Avery, 589 F. 2d 906 (5th Cir. 1979); United States v. Shanahan, 574 F. 2d 1228 (5th Cir. 1978), and (2) by opposing the recommendation for a sentence reduction by vigorously and vindictively presenting incorrect hearsay and unfounded conclusions regarding the petitioner. See United States v. Arnett, 628 F. 2d 1162 (9th Cir. 1979); United States v. Ewing, 480 F. 2d 1141 (5th Cir. 1973). Petitioner's attorney related to him that the judge was going to change the sentence to a B2 type prior to the government's opposition. Petitioner's attorney was ineffective by not opposing the government's actions, which prejudiced the petitioner.

ARGUMENT IV

THE COURT VIOLATED RULE 11, F.R.CR.P. BY FAILING TO ADEQUATELY INQUIRE THAT THERE IS A FACTUAL BASIS FOR THE PLEA

The petitioner unequivocally stated in

court that he did not do the alleged acts willfully and knowingly, thereby nullifying the key element of the three counts. After the government read the three counts to which the petitioner was to plead guilty, the court superficially inquired as to whether the petitioner read the entire indictment and understood the contents.(A.T. 14). Petitioner and his counsel responded in the affirmative. No one explained the elements necessary to comprise the offenses. The session came to an end when the petitioner emphatically denied that he committed the offenses outlined in the three counts in the plea agreement.

Later that day the government presented another plea agreement, and once again the court failed to adequately inquire whether a factual basis existed. The court merely had the government read a lengthy factual basis statement that comprised forty-two of the eighty page transcript. Once again the court asked, "Is that what you did?" (A.T. 70,74),

without establishing a factual basis.

RULE 11 NONCOMPLIANCE

Trial court did not comply with Rule 11(c), in two respects; (1) the reading of the factual basis followed the court's questioning of the petitioner, and (2) the court's acceptance of the defendant's and his attorney's assurances that the charges were understood without reciting them. See United States v. Patterson, 739 F. 2d 191, 194 (5th Cir. 1984). This represented an "entire failure to address a core concern." United States v. Punch, 709 F. 2d 889, 894 (5th Cir. 1983).

This Court in McCarthy v. United States, 394 U.S. 459 (196) held that Rule 11 mandates the district judge's direct inquiry of a defendant pleading guilty as to whether the defendant understands the nature of the charge against him and is aware of the consequences of his plea. Noncompliance by the district court with Rule 11 requires that the defen-

dant's guilty plea be set aside and his case remended for another hearing at which he may plead anew. The McCarthy court stated that:

> "Despite petitioner's inability to convince the courts below that he did not fully understand the charge against him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the government the money it claimed without necessarily admitting that he committed the crime charged, for that crime requires the very type of specific intent that he repeatedly disavowed. See Sansome v. United States, 380 U.S. 343 (1965). Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors." Id at 470.

The petitioner stated that he accepted the responsibility for any errors committed by his office, but that he never willfully or knowingly set out to defraud anyone.

PETITIONER MAINTAINED INNOCENCE

Prior to the hearing, Petitioner's "Version of events" was submitted, in which he denied any intent to the alleged crime. The

court failed to resolve any contradictions or "equivocal responses" by the petitioner regarding his guilt. In Burton v. United States, 483 F. 2d 1182 (9th Cir. 1973), a case which tracks the present case, the court concluded in its opinion on rehearing:

> "...that Rule 11 requires the Court to determine that there is a factual basis for a plea prior to entry of judgment and not just at the time the plea is accepted."

Based on the "failure to heed strict requirements of Rule 11" the Burton court urged the district court vacate the order denying the § 2255 motion and to set aside Burton's convictions.

ARGUMENT V

APPELLATE COURT ERRED BY NOT DETERMINING THAT TRIAL COUNSEL'S PERFORMANCE WAS INCOMPETENT

"A federal prisoner who had been effectively deprived of his right to appeal by deception practiced upon him by his counsel is entitled to present by motion under § 2255 errors ordinarily cognizable only on appeal."

Desmond v. United States, 333 F. 2d 378, 380 (1st Cir. 1964). See also Nash v. United States, 342 F. 2d 366, 367 (5th Cir. 1965).

PROCEDURAL DEFAULT

Petitioner has been prejudiced throughout this appeal process because a direct appeal was not filed by his trial attorney as requested. A procedural default of a colorable constitutional claim strongly implies incompetence, and incompetence is itself cause for such a default. In Runnels v. Hess, 653 F. 2d 1359 (10th Cir. 1981), the court held that erroneous decisions by counsel, even if "short of that necessary to make out a Sixth Amendment claim," may constitute cause for a procedural default. If a defendant has a procedural right to competent counsel, then a showing that his counsel was incompetent would demonstrate a violation of that right. Any inquiry into prejudice would be unnecessary. Defendants may thus raise claims based upon incompetence of counsel without

asking the court to inquire into some ill-defined notion of competence. To make out a due process violation, the defendant need only establish that counsel's acts or omissions were such that the factfinder would likely have entertained a reasonable doubt about the defendant's guilt had they not occurred.

Because the Sixth Amendment has been incorporated into the due process clause, it is only logical to define the content of the right it guarantees in terms of its relation to due process, which, in this context entails examining the Sixth Amendment in light of the fair trial guarantee. A defendant is entitled to a new trial whenever he shows that counsel's acts or omissions, even if reasonable, are likely to have caused outcome-determinative prejudice to his defense.

Petitioner asserts that he was denied effective assistance of counsel throughout his cause, and in particular:

INCOMPETENT RESEARCH

A. Counsel's assistance was ineffective due to a deficiency in researching the legal aspects of the case since he: (1) failed to attack the indictment on that grounds that the Medicare/Medicaid statutes were inapplicable to the facts of the case, since the services billed for were actually performed, and (2) counsel failed to raise arguments relative to the obstruction of justice charge concerning: (a) insufficiency of the indictment, (b) duplicity of the indictment, (c) attempted entrapment, (d) admissibility of the recordings, (e) exclusion of the recordings, (f) indictment was a violation of due process, and (g) the indictment was a violation of first amendment rights.

LEGAL RIGHTS DENIED

B. Counsel's assistance was ineffective and prejudicial since he failed to advise the defendant regarding his legal rights since: (1) defense counsel knew the defendant wanted

a jury trial, and while aware of defendant's recent disabling injury, coerced him to sign a plea agreement although counsel received full payment for a jury trial, and (2) counsel continued to assure defendant that he would receive an unexecuted sentence.

PROCEDURAL DEFAULT

C. Counsel was ineffective by failing to make proper and adequate objections to judicial errors: (1) counsel failed to assure compliance with Rule 11 and that the Court discuss the elements of the offenses to which the defendant pled, since the plea is not voluntary unless real notice of the true nature of the charges against him is provided, (2) counsel failed to see that the court complied with Rule 32(c)(3)(D) F.R.Cr.P., which requires that the sentencing court make a finding of fact as to each controverted fact contained in the presentence report. Since the written record of any such findings and determinations was not appended to the PSI

report, one can only assume that the controverted matter was taken into account in sentencing; (3) counsel failed to file written objections to the government's factual basis statement as requested; and (4) counsel failed to present defendant's version, corrections to PSI report, and important letters to the court in time to be read and evaluated by the judge in determining the sentence, leaving only the prosecution's version on which the judge based his decision.

DENIED DIRECT APPEAL

D. Counsel's assistance was ineffective due to failure to follow established legal procedures in that he: (1) failed to file an appeal as requested (E.H. 76); (2) failed to advise the defendant of the ten-day time period in which to file an appeal (E.H. 77), thus depriving the defendant of his right to a direct appeal; and (3) failed to respond to defendant's repeated requests for assistance in particular to the breach of the plea agre-

ement.

Petitioner's counsel did not accurately understand the statutes. Coupled with procedural defaults demonstrated throughout the hearings, his performance was rendered incompetent. If a colorable constitutional claim strongly implies incompetence, then the incompetence is itself cause for such a default. If a defendant has a procedural right to competent counsel, then a showing that his counsel was incompetent would demonstrate a violation of that right. Petitioner asserts he was prejudiced by his counsel's actions.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, petitioner prays that this Hororable Court grant this petition for a writ of certiorari, and that upon hearing, this Honorable Court reverse the judgments of the Court of Appeals and district court, vacate his conviction, and

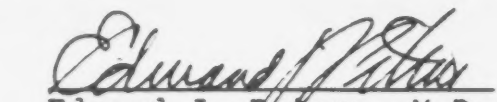
grant such further and other relief which this Honorable Court deems just and proper.

Respectfully submitted,

Edward J. Petrus, M.D.
3413 Spanish Oak Dr.
Austin, Texas 78731
(512) 454-6500
Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been served on the Soliciter General, Department of Justice, Washington, D.C.20530 one copy to the United States Attorney, 655 E. Durango Blvd., San Antonio, Texas 78205, by U.S. mail, postage pre-paid on the 24 th day of February, 1989.



Edward J. Petrus, M.D.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1932

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

EDWARD JOSEPH PETRUS, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
(CA-A-86-401)

(December 1, 1988)

Before GEE, GARWOOD, and HIGGINBOTHAM, Circuit Judges. PER CURIAM:

Dr. Edward Joseph Petrus, Jr., was convicted on his guilty plea of two counts of submitting false Medicare and Medicaid claims in violation of 42 U.S.C. §§ 1395nn(a)(2) and 1396h(a)(2) and one count of obstruction of justice in attempting to suborn perjury of a

grand jury witness in violation of 18 U.S.C. § 1503. Pursuant to a plea agreement, thirty-three other counts were dismissed. Petrus was sentenced to consecutive three year prison terms on each of the three counts and assessed a total of $55,000 in fines. Petrus did not appeal his conviction. Rather, he filed a Rule 35, F.R.Cr.P., motion to reduce his sentence. The district court denied this motion, and this court affirmed the district court's judgment on appeal.

Petrus next filed a 28 U.S.C. § 2255 petition to vacate, set aside, or correct his sentence raising numerous challenges to the district court's acceptance of his guilty plea and the effectiveness of his counsel. Following a hearing on Petrus's claims, the district court denied his motion. Petrus now appeals.

For reasons stated below, we affirm the district court's denial of Petrus's § 2255 motion.

I

As an initial matter it must be noted that the "grounds for relief under § 2255 are narrower than those for relief on direct appeal." United States v. Smith, 844 F.2d 203, 205 (5th Cir. 1988). "In determining whether a claim of error is cognizable under Section 2255, a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981); Smith, 844 F.2d at 205-06. Constitutional or jurisdictional errors may be asserted under § 2255, unless there has been a deliberate bypass of the appeal process. Other injury that cannot be raised on direct appeal but which, if condoned, would result in a complete miscarriage of justice may also be brought under § 2255. However, non-constitutional or nonjurisdictional errors that could have been raised on direct appeal are not

cognizable under § 2255. Capua, 656 F.2d at 1037; Smith, 844 F.2d at 205-06. Accordingly, the initial task is to determine into which of these two categories Petrus's claims fall.

Petrus argues that the district court erred in accepting his guilty plea when he failed to unequivocally admit to the intent to commit Medicare/Medicaid fraud as established by the factual basis underlying the plea. Petrus also asserts that the factual basis failed to support a finding of guilt under the Medicare-/Medicaid fraud statutes and that the district court failed to personally explain to him the elements of the offenses. These three claims of error implicate the voluntariness of Petrus's guilty plea and are therefore constitutional in nature. See Smith, 844 F.2d at 206. Claims of ineffective assistance of counsel also have constitutional implication. Id. Accordingly, each of Petrus's claims is cognizable under § 2255.

II

For a guilty plea to be truly voluntary the defendant must know "what it is he is admitting, so that he does not mistakenly consent to be punished for a crime he did not commit." United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). To ensure that Petrus knew what he was admitting, the district court summarized the three counts for Petrus and had the prosecutor read to Petrus in open court each count of the indictment to which he was pleading guilty. Each count tracked the language of the statutes involved, and when asked by the court if he did what was alleged in the indictment Petrus said, "Yes, sir, I goofed...I made a mistake, and I think that those counts are correct."

The district court then had the government summarize what its evidence would be on the three counts. The government alleged in a

lengthy factual statement that in May 1983, Petrus, an ophthalmologist, was suspended for six months from participation in the Medicare/Medicaid program. Because a major part of Petrus's business at the Eye Center of Austin involved patients covered by either Medicare or Medicaid, Petrus hired another ophthalmologist, Dr. Paul Malsky, to see all the Medicare/Medicaid patients during Petrus's suspension. Petrus's staff at the Eye Center of Austin applied for and acquired a Medicare/Medicaid provider number for Dr. Malsky to be used in applying for Medicare/Medicaid payments. Thereafter, Petrus told Joy Simmons, his office manager, to bill for all Medicare/Medicaid services under Dr. Malsky's provider number.

Specifically with regard to Count 10 of the indictment, the government stated that the evidence would show that Petrus provided medical services to a Medicare patient and

thereafter Medicare was billed for those services using Dr. Malsky's provider number. The result of this was that Dr. Malsky was represented as providing the services to the patient rather than Petrus. Thereafter, Medicare made payment to the Eye Center on this claim. Shortly after receiving such payment, Dr. Malsky disassociated himself from Petrus because of Petrus's "lies and evasiveness" surrounding the treatment of Medicare/Medicaid patients and the billing for those treatments.

After Dr. Malsky stopped working with Petrus, Petrus associated himself with another ophthalmologist, Dr. Gregory Baer. This association was on a part-time basis, and Petrus's office acquired a Medicare/Medicaid provider number for Dr. Baer just as it had done for Dr. Malsky.

Specifically with regard to Count 24 of the indictment, the government stated that the

evidence would show that Petrus provided medical services to a Medicaid patient and that thereafter Medicaid was billed for these services using Dr. Baer's provider number. The use of Dr. Baer's provider number to bill for services by Petrus resulted in the Eye Center receiving payment from Medicaid in January 1984. Four days after receiving such payment, Dr. Baer severed his relationship with Petrus when he learned that Petrus had been suspended from the Medicare/Medicaid program and that Petrus had used his provider number.

A federal grand jury began investigating Petrus for submitting false Medicare/Medicaid claims. Members of Petrus's office staff and Dr. Baer were subpoenaed to testify before the grand jury.

With regard to Count 31 of the indictment, the government stated that the evidence would show that after Dr. Baer had been served with

a grand jury subpoena, he telephoned Petrus to inform him that he would be testifying before the grand jury. Petrus had previously asked Dr. Baer to keep him informed of his contact with any investigators in his case. During their telephone conversation, Petrus specifically and repeatedly told Dr. Baer that if he were questioned concerning specific patients and whether or not he had treated them he should testify that he could not remember. This was Petrus's advice even when Dr. Baer told he that he could remember whether or not he had treated the patients they were discussing. This telephone conversation was recorded as Dr. Baer had agreed to cooperate with the investigators, and pertinent portions of the transcript of the tape recording were read into the record during the government's presentation of the factual basis.

In another telephone conversation that same day (the day before Dr. Baer was scheduled to

testify before the grand jury), Petrus told Dr. Baer that he should testify that he did not remember facts whenever he was asked about something that would require giving testimony which was damaging to Petrus. Petrus also told Dr. Baer to testify that he (Dr. Baer) had seen the patients but Petrus had made the notes in the patients' files. This was not true.

After this lengthy recitation of the factual basis supporting the charges, the district court asked Petrus if he did what the government had just alleged. Petrus said that he agreed on the three counts, but stated:

> THE DEFENDANT:...there are a lot of aspects of the testimony from the Government where we differ in opinion.
>
> But one of the things that I said in the beginning was that I had made some errors, that I had made some mistakes, and that it is not that clear-cut and dry.
>
> The three--the two episodes that were brought up, they should never have occurred. They were done in error and it's my office, and I am responsible for what comes out of the office and I own up to that responsibility.

> THE COURT: Well, with regard to the three counts to which you intend to enter a guilty plea -- that is, Count Ten, Twenty-Four and Thirty-One, do you agree with the prosecutor's summary as to what you did with regard to those three counts?
>
> THE DEFENDANT: Approximately, Your Honor. Approximately, yes.

When asked if he was pleading guilty because he was guilty and for no other reason, Petrus stated:

> Your Honor, I am pleading guilty because, in fact, during the course of that time that it occurred, there were -- there were episodes that occurred that were not correct and that I made no special effort to correct them, and because I made no special effort I really feel that I am responsible for those.

The district court questioned Petrus further, asking him (1) if he had done what was charged in the indictment; (2) if he wanted to continue in his guilty plea; (3) if he was pleading guilty because he was in fact guilty and not for any other reason; (4) if he had discussed the charges and any possible defenses or alternatives to pleading guilty with his attorney; and (5) if he understood each of

the three counts he was charged with. Petrus answered "Yes" to each question and stated that "I understand (the charges) quite well now."

Against this record, Petrus's challenge to the voluntariness of his guilty plea must fail. Petrus first claims that the factual basis was insufficient because his statements about errors, mistakes, and responsibility for what went on in his office negate the finding of intent to commit Medicare/Medicaid fraud. The district court continued to question Petrus after he made the "equivocal" statements, and during this questioning Petrus admitted that he did what was charged in the indictment, and that he understood "quite well" each of the charges against him, and that the only reason he was pleading guilty was because he was in fact guilty. The statements were more than sufficient to clear up any question concerning Petrus's intent which

were raised by his "equivocal" statements.

Furthermore, Petrus's "equivocal" statements reveal at most that his interpretation of the facts differed from the government's version. They do not place in question whether he willfully and knowingly made a false statement or representation of material fact in submitting the Medicare and Medicaid claim forms charged in Counts 10 and 24. Petrus knowingly and voluntarily admitted that he had such an intent when he stated that he understood "quite well" each of the charges and that he did what he was charged with. Such statements, under oath, "'carry a strong presumption of verity'" and "'constitute a formidable barrier to any subsequent collateral proceedings.'" United States v. Patterson, 739 F.2d 191, 195 (5th Cir. 1984), quoting Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct 1621, 52 LEd 2d 136 (1977). Petrus has failed to overcome that presumption or barrier

in this case.

Petrus next asserts that the factual basis underlying his guilty plea was insufficient because it failed to establish the commission of a crime. Specifically, Petrus asserts that the Medicare and Medicaid fraud statutes make submitting a false statement or representation a felony only when the statement or representation is made in connection with services that were either unnecessary or not performed. Petrus reasons that because the services for which he submitted bills were actually performed and necessary, he could not be found guilty under the facts as alleged by the government. He further states that he would not have pleaded guilty if the district court had properly advised him.

The two counts of submitting false information with regard to the payment of Medicare and Medicaid claims are derived from 42 U.S.C. §§ 1395nn(a) and 1396h(a), which read in pertinent part:

> (a) Making or causing to be made false statements or representations
>
> Whoever -
>
> * * * * *
>
> (2) at any time knowingly and willfully makes or causes to be made any false statement or representation of such a material fact for use in determining rights to any such benefit or payment,
>
> * * * * *
>
> shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both[.]

In this case, the factual basis of the charges against Petrus established that Petrus, knowing that he had been suspended from participation in the Medicare/Medicaid programs, caused either Dr. Malsky's or Dr. Baer's provider number to be placed on the application for Medicare and Medicaid payment when in fact Petrus had furnished the medical services for which payment was to be made. Accordingly, Petrus's conduct falls squarely within the

conduct plainly prohibited by the Medicare/Medicaid fraud statutes. Nothing in the plain language of the statutes, their legislative histories, or the pertinent case law even remotely evinces that these statutes apply only in those instances where the services are either not performed or are not necessary.

Furthermore, a false statement or representation is "material" under the Medicare/Medicaid fraud statutes if it puts the claimant in the position to receive Medicare/Medicaid payments, whether rightfully or wrongly. United States v. Adler, 623 F.2d 1287, 1291 (8th Cir. 1980). Petrus's representations clearly put his corporation in a position to receive payments to which it was not entitled. Accordingly, the factual basis underlying Petrus's guilty plea was sufficient to find Petrus guilty of Medicare/Medicaid fraud under the applicable statutes, and his second claim of error lacks merit.

Petrus next asserts that the district court failed to personally explain the elements of the offense to him. This claim also lacks merit. To the extent that Petrus's claim is based on his strained interpretation of the Medicare/Medicaid fraud statutes, it cannot be error to fail to explain what the law is not. Furthermore, the district court had the prosecutor read to Petrus the counts of the indictment to which he was pleading guilty. Where, as in this case, the charges track the language of the statutes and are not complex, and the defendant is well-educated, sophisticated, represented by counsel, and admits to understanding the charges, a simple reading of the indictment is all that is necessary for the court to discharge its duty to personally inform the defendant of the nature of the charges against him. See United States v. Punch, 709 F.2d 889, 891-92, 893 n.4, 894 n.6 (5th Cir. 1983); Dayton, 604 F.2d at 938.

Based on the foregoing, Petrus's plea was truly voluntary. He was properly and adequately advised of the nature and elements of the charges against him, and he freely admitted doing what he was charged with in both the indictment and the factual basis.

III

Petrus's final claim is that he was denied effective assistance of counsel by his trial attorney. To be entitled to relief on this claim, Petrus must show "(1) that his counsel's representation fell below an objective standard of reasonableness; and (2) that he was prejudiced by his counsel's ineffective assistance." Smith, 844 F.2d at 208-09, citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 SCt 2052, 80 LEd 2d 674 (1984). To establish prejudice, Petrus must show "'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial.'" Smith, 844 F.2d at 209, quoting Hill v. Lockhart, 474 U.S. 52, 57, 106 SCt 366, 88 LEd 2d 203 (1985). "Great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" Martin v. McCotter, 796 F.2d 813, 816 (5th Cir. 1986) (quoting Lockhart v. McCotter, 782 F.2d 1275, 1279 (5th Cir. 1986) cert. denied, 479 U.S. 1030 (1987)), cert. denied, 479 U.S. 1057 (1987); Accord Strickland, 466 U.S. at 689.

Petrus first claims his counsel was ineffective for failing to attack the indictment on the grounds that the Medicare/Medicaid fraud statutes were inapplicable because the services were actually performed. As noted above, the fact that the services were actually performed is not significant under the Medicare/Medicaid fraud statutes. The Medicare/Medicaid fraud statutes directly applied to this case, and counsel's failure to pursue

a defense for which there was no support in the statutory language, legislative history, or case law cannot be considered deficient performance.

Petrus next asserts that counsel was deficient for failing to attack the obstruction of justice count of the indictment on the basis that (1) it did not include every element of the charged offense; (2) it was duplicitous; (3) it was the result of a conspiracy between the agents and Dr. Baer to entrap him; (4) the tape recorded telephone conversations were obtained in violation of wire taping statute, 18 U.S.C. § 2511, and should have been excluded from consideration because they were illegally seized; (5) it was unconstitutionally vague; and (6) the interception of the conversation violated Petrus's first amendment rights. Each of these contentions will be discussed in turn.

Petrus claims his attorney should have challenged Count 31 of the indictment because none of his actions fell within the language that the obstruction of justice be accomplished "by threats or force, or by threatening letter or communication." See 18 U.S.C. § 1503. Section 1503 is not limited to threats or force but also extends to any situation where one urges and advises a witness to testify falsely. United States v. Davis, 752 F.2d 963, 973 n.11 (5th Cir. 1985); see also United States v. Ogle, 613 F.2d 233, 239 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980). The statute reads, "Whoever corruptly, or by threats or force..." 18 U.S.C. § 1503 (emphasis added). Accordingly, it was not deficient performance for Petrus's counsel to not challenge Count 31 on this basis.

With regard to Petrus's assertion that his attorney should have challenged Count 31 on duplicity grounds, a charge in duplicitous if

it contains more than one offense. United States v. Lyons, 703 F.2d 815, 821 & n.8 (5th Cir. 1983). Count 31 clearly contains only one offense.

Next Petrus asserts that Count 31 resulted from a conspiracy between Dr. Baer and the investigators to entrap him and that his attorney should have attacked it on that basis. It should be noted that Petrus does not claim he would not have pleaded guilty if his attorney had presented an entrapment defense to the obstruction of justice counts. Absent such, Petrus cannot establish the second prong of an ineffective assistance claim which would entitle him to any relief. Lockhart, 474 U.S. at 60. Additionally, Petrus stated to the court prior to the acceptance of his guilty plea that he had discussed with his attorney the various defenses he had to the charges against him but that he still wanted to plead guilty. Accordingly,

Petrus is not entitled to relief on this claim.

Petrus also claims that the taped telephone conversations were illegally obtained and that it was ineffective assistance of counsel for his attorney not to seek their suppression. As Petrus points out, 18 U.S.C. § 2511 generally prohibits the willful interception of any wire or oral communication. However, an exception to this general rule permits interception where one party consents to the interception and such consent is not given with an unlawful motive. 18 U.S.C. § 2511(2)(d). The conversation between Petrus and Dr. Baer were recorded with the consent of Dr. Baer. Dr. Baer's motive was not unlawful; he was simply assisting in a criminal investigation. Failure to claim otherwise was not ineffective assistance. Moreover, Petrus has failed to allege prejudice resulting from this asserted error. Accordingly, he is not entitled to relief on

this claim.

Petrus next charges that his attorney should have attacked the obstruction of justice counts of the indictment because they were unconstitutionally vague. This claim is based on a 1982 amendment to § 1503 which deleted all references to "witnesses" from the statute. This Court has specifically held, however, that the face of the language of § 1503 still applies to witnesses even though the statute does not specifically refer to witnesses. United States v. Branch, 850 F.2d 1080, 1082 (5th Cir. 1988), citing United States v. Wesley, 748 F.2d 962, 964 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985). Accordingly, failure to challenge the indictment on this basis was not deficient performance, particularly when this Court decided Wesley less than two months after the indictment was filed against Petrus

Petrus further challenges his counsel's performance with regard to the obstruction of justice counts on grounds that the recorded conversation between himself and Dr. Baer was "protected by the First Amendment and penalizing such speech is a violation of due process." ONce again, Petrus is not entitled to relief on this claim because he has failed to allege any prejudice resulting from his counsel's failure to pursue such a defense. Lockhart, 474 U.S. at 60.

Petrus asserts that his attorney's assistance was ineffective and prejudicial because he coerced him to sign the plea agreement knowing Petrus wanted a jury trial, and because he assured Petrus he would receive an unexecuted sentence. These allegations are directly refuted by Petrus's own sworn testimony at his plea proceeding and at the evidentiary hearing before the district court. Before the court accepted Petrus's guilty

plea, Petrus told the court that he was pleading guilty freely and voluntarily and that his plea was not induced by any promises other than those contained in the plea agreement, by any threats or coercion, or by any prediction or prophesy concerning the length of the sentence he would receive. At the evidentiary hearing Petrus testified that his attorney suggested that he plead guilty but it was his own decision to do so. Because sworn testimony in open court carries a strong presumption of truthfulness, Paterson, 739 F.2d at 195, and because Petrus's allegations of coercion and assurances as to the length of his sentence are affirmatively contradicted by the record, these two allegations of ineffective assistance of counsel must fail.

Petrus also alleges that his counsel was ineffective for (1) failing to ensure that the court described the critical elements of the offense to him, (2) failing to ensure that the

court made a finding as to each controverted fact in the presentence investigation report (PSI), and for (3) failing to file written objections to the government's factual basis. These claims lack merit. First, as discussed above, the district court did adequately describe the elements of the offenses to Petrus. Second, at sentencing Petrus's attorney provided the court with written objections and corrections to the PSI and also with a written copy of Petrus's own version of the offenses. The latter was incorporated into the PSI, but the court did not address Petrus-'s written objections to the PSI at sentencing. However, in response to a subsequent pro se motion to correct the PSI, the district court specifically found that the information found in the PSI was correct. Accordingly, Petrus's objections to the PSI have been considered and rejected, and Petrus has failed to show any prejudice resulting from his

attorney's failure to have the district court make its finding sooner than it did. Third, contrary to Petrus's assertions, his attorney did file his version of the offenses with the court and the court incorporated it into the PSI. Accordingly, Petrus is entitled to no relief on any of these three claims.

Finally,[1] Petrus asserts that his counsel was ineffective because (1) he failed to file a direct appeal as requested or to advise him of the ten-day time period within which to file an appeal; and (2) he failed to respond to various letters. With regard to filing a direct appeal, Petrus testified that he asked his attorney to appeal his conviction because

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[1]Petrus also makes broad and conclusory claims of ineffective assistance of counsel based on counsel's alleged failure to conduct a thorough investigation or request a preliminary examination or hearing. Because such claims are conclusory and made without even the slightest contention of prejudice, they will not receive more detailed consideration herein.

he thought his nine-year sentence was excessive. Petrus's attorney testified that he told Petrus that it was his opinion that the appellate court would be unlikely to disturb his sentence on direct appeal because the sentence was within the parameters of the statutes. Accordingly, Petrus's attorney suggested that relief be sought through a Rule 35 motion for reduction of sentence. Pursuant to that advice, a Rule 35 motion was filed. The district court denied this motion, and its judgment was upheld on appeal.

In the light of Petrus's desire to simply challenge his sentence as excessive, it was professionally reasonable for counsel to pursue relief through a Rule 35 motion rather than a direct appeal. With regard to Petrus's claim that his counsel was ineffective for failing to respond to several letters, these letters were written after the district court denied Petrus's Rule 35 motion, and they do

not implicate the validity of his guilty plea. Accordingly, no prejudice can be shown.

Based on the foregoing, the judgment of the District Court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1932

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD JOSEPH PETRUS, JR.
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 1, 5 Cir., 1988, ___ F.2d__)

(January 3, 1989)

Before GEE, GARWOOD and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular

active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

\S\ HIGGINBOTHAM
United States Circuit Judge

APPENDIX D

42 U.S.C.] 1395nn. Offenses and Penalties

(a) Making or causing to be made false statements or representations

Whoever -

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this subchapter,

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation or a material fact for use in determining rights to any such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or

services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year or both.

18 U.S.C. 1503 Influencing or injuring officer or juror generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.